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IN THE

Supreme Court of the United States

October Term, 1946

No. 301

MARCELINO GARCIA and VICTOR ALVAREZ, as Executors of the Last Will and Testament of Manuel Diaz, deceased, EDITH GILMOUR DIAZ, MARY ADELA EADS and MANUEL DIAZ, JR.,

Petitioners,

against

PAN AMERICAN AIRWAYS, INC.,

Respondent,

and

R. O. D. SULLIVAN,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioners, who are the surviving executor and heirs of Manuel Diaz, deceased, seek to have this Court review an interlocutory decision of the New York Court of Appeals (R. p. 96), affirming an order of the Appellate Division of the Supreme Court, Second Judicial Department (R. p. 72), which in turn affirmed an order of the Supreme Court, Westchester County (R. p. 4), denying plaintiffs' motion for an order under Rules 103 and 109 of the New York

Rules of Civil Practice (R. p. 5) striking the first, second and third affirmative defenses contained in the answer of the respondent Pan American Airways, Inc. (R. pp. 29-39). The motion unsuccessfully sought to attack the defenses on the grounds that they were "sham," "irrelevant" and "insufficient in law" (R. pp. 6, 7).

The decision of the Court of Appeals, rendered unanimously and without opinion, is reported at 295 N. Y. 852. The decision of the Appellate Division, handed down with an opinion by Mr. Justice HAGARTY in which all of the Justices concurred, is reported at 269 App. Div. 287. The opinion of the Supreme Court, sitting at a special term for the hearing of motions, is reported at 183 Misc. 258.

The petitioners, both in their petition and brief, refer to the decision of the Court of Appeals as a "final order and judgment." This is not the fact. The order affirmed by that Court was entered as the result of an appeal from a decision upon a preliminary motion addressed to the pleading of the defendant Pan American Airways, Inc. The action is now pending on the general calendar of the Supreme Court, Westchester County, and has not been tried (R. p. 110). No judgment has been entered finally determining the litigation.

The Facts and the Pleadings.

The petitioners brought the present suit to recover damages for the alleged wrongful death of Manuel Diaz and for the loss of his baggage and personal effects in the accident involving the aircraft "Yankee Clipper" near Lisbon, Portugal, on February 22, 1943. The "Yankee Clipper" departed from New York at 10:25 A. M. February 21, 1943, and after making stops at Bermuda and Horta, Azores, arrived near Lisbon in the evening of the following day,

where it crashed into the waters of the Tagus River at 6:47 P. M. (R. p. 42).

The complaint (R. pp. 15-25) alleges in substance that the defendant Pan American Airways, Inc., for a valuable consideration, agreed to transport the said Manuel Diaz, his baggage and personal effects from La Guardia Airport, New York, to Lisbon, Portugal, that thereafter the said defendant, its agents, servants and employees, including the defendant Sullivan, who was the pilot of the aircraft, caused and permitted the "Yankee Clipper," on which the decedent was a passenger, to crash into the waters of the Tagus River at Lisbon, causing fatal injuries to the decedent, and that under the law of Portugal the defendants are jointly and severally liable to the widow and children of the decedent for the damages resulting from the death, unless the defendants prove that the crash and demolition of the aircraft were not due to their fault or negligence. The complaint further alleges that the crash and demolition of the aircraft were caused by the negligence of the defendants. In a separate cause of action (R. p. 23) the executors seek to recover for the loss of baggage and personal effects having an alleged value of $865.89.

The statements at pages 2 and 4 of the petition that the respondent has offered and is willing to pay $8,291.87 in settlement of petitioners' claims and that the defendant Sullivan, prior to the institution of suit, left the jurisdiction of the State are without support in the record. The statement at page 26 of the brief in support of the petition that the decedent was killed as a result of the negligent operation of respondent's airplane, and which is characterized as the outstanding "fact" in this case, is also wholly without support in the record. The issues of fact, including the issue as to respondent's alleged negligence, have not been tried.

The answer of the respondent (R. pp. 26-41) sets forth five separate defenses, of which only the first three were at issue on the motion. The first defense (R. pp. 29-32) alleges that at the time the decedent met his death he was being transported under a contract of transportation wherein the place of departure and the place of destination were within the United States and there were agreed stopping places at Bermuda, Lisbon, Portugal, and Natal, Brazil; that the transportation was international transportation within and subject to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, and Additional Protocol, signed at Warsaw October 12, 1929 (otherwise known as the Warsaw Convention), said Convention having been adhered to on behalf of the United States in accordance with the proclamation of the President, dated October 29, 1934, as advised by the Senate of the United States (49 Stat., pp. 3000 *et seq.*). It is further alleged that the defendant Pan American Airways, Inc., duly complied with the conditions and requirements of the Convention; that defendant and its agents took all necessary measures to avoid the damage claimed by the plaintiffs, except for such measures as were impossible for it or them to exercise, and defendant claims exemption from and limitation of liability in accordance with Articles 17, 18, 20, 22 and 24 of the Convention.

For a second separate defense (R. pp. 33-38) the answer recites at length the terms of the contract between the decedent and said defendant, which were contained in a passenger contract ticket issued to the decedent for the transportation in question. It is alleged that, in accordance with the said agreement, the rights of the parties were governed by and subject to the rules relating to liability established by the said Warsaw Convention, and defendant claims exemption from and limitation of liability in accordance with

the rules relating to liability for death established by the Convention and referred to in the answer.

For a third separate defense (R. pp. 38-39), which relates to the defendant's liability for loss of or damage to baggage, the defendant pleads that on or before February 21, 1943, it issued a baggage check to the decedent for each article of baggage tendered by him for transportation in accordance with the contract referred to above, that the total weight of decedent's baggage was 25 kilograms and that in accordance with the provisions of the baggage checks and the contract of transportation, the defendant's liability in connection with said baggage is limited to the amounts prescribed by the Convention.

To sum it up, the first separate defense pleads that the defendant's liability is limited by the Warsaw Convention as a matter of law, and the second and third separate defenses plead that it is so limited under the terms of the contract between the parties.

The Warsaw Convention was originally signed by the representatives of twenty-three nations at Warsaw, Poland, on October 12, 1929. It is an international treaty, regulating and limiting the rights and responsibility of carriers by air in international transportation of passengers and property. The Convention, after it came into force, was left open for adherence by any State (Art. 38). The United States adhered to the Convention by proclamation of the President, dated October 29, 1934, as advised by the Senate June 15, 1934 (49 Stat. 3000). It has been ratified or adhered to by thirty nations, including substantially all of the leading commercial nations of the world. See *A List of Treaties and Other International Acts of the United States in Force on December 31, 1941*, Department of State Publication No. 2103 (1944).

The Convention applies to all international transportation of persons, baggage, or goods performed by aircraft

for hire (Art. 1). International transportation is defined in Article 1, clause (2), as

> "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. * * *"

The carrier is presumptively liable for death or injury to passengers (Art. 17) and for loss of or damage to property (Art. 18), but is entitled to limit its liability to certain specified amounts (Art. 22). The Convention further provides (Art. 25) that the carrier shall not be entitled to the benefit of the provisions excluding or limiting liability if the damage is caused by wilful misconduct on the part of the carrier or its agents.

In recommending the adherence of this country to the Convention, Secretary of State Hull in his report to the President declared (Senate Document, Executive G, 73rd Cong. 2nd Sess.):

> "This Convention has been studied by the Department of Commerce, which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and afford protection to the air-transport operator as well as to passengers and shippers, and that if the United States fails to become a party to the Convention American air-transport lines operating on an international basis will be at a disadvantage while operating in countries that are parties to the Convention."

The Decisions of the Courts Below.

The Justices of the Appellate Division were unanimous in the view that the motion to strike the defenses was properly denied. In an opinion by Mr. Justice Hagarty (R. pp. 75-80; reported at 269 App. Div. 287) the Court reviewed the provisions of the Convention, including the definition of international transportation contained in Article 1 thereof, and concluded as follows (R. pp. 77-78; 269 App. Div. at pp. 291-292):

> "The contract comes precisely within the scope of the definition of 'international transportation' employed in the Warsaw Convention. (Cf. *Grein* v. *Imperial Airways, Ltd.*, [1937] 1 K. B. 50.)
>
> Inasmuch as the Convention, as a treaty, constitutes part of the law of this land, overriding State law and policies, (U. S. Const., art. VI, § 2; *Wyman* v. *Pan American Airways*, 181 Misc. 963, affd. 267 App. Div. 947, affd. 293 N. Y. 878, certiorari denied April 23, 1945, 324 U. S. 882; *United States* v. *Pink*, 315 U. S. 203, 230, 231), its provisions supersede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori*. It comes to this: One is not bound to seek redress in the courts of this country. He may submit to the jurisdiction of the foreign State and, presumably, have his rights determined in accordance with the law of that place. That is not our concern. But if he institutes action here, the law which we will apply is that set forth by the terms of the Convention, even though it be inconsistent with the law of the place. Comity is abridged to that extent. (*The Titanic*, 233 U. S. 718; *Royal Mail S. Packet Co.* v. *Companhia de Nav. Lloyd Brasileiro*, 31 F. 2d 757; *The Mandu*, 102 F. 2d 459.)"

The Appellate Division held further (R. pp. 78-80) that the Convention is self-executing, that its provisions are

enforceable, notwithstanding the fact that the passenger was not afforded a choice of rates, and that the sufficiency of the second and third defenses, assuming the need of making such determination, is dependent upon the law of Portugal and is a matter for proof at the trial.

The affirmance by the Court of Appeals was unanimous and without opinion, 295 N. Y. 852. Petitioners thereafter moved in the Court of Appeals for an order amending the remittitur for the purpose of showing that a treaty and questions under the Constitution of the United States were necessarily considered and passed upon by that Court (R. p. 103). The motion was denied without opinion (R. p. 102).

POINT I.

The order of the New York Court of Appeals was not a final judgment or decree reviewable by this Court within the meaning of Section 237 of the Judicial Code.

It seems perfectly clear that this Court is without jurisdiction to grant a review herein because the order of the Court of Appeals was not final as required by Section 237 of the Judicial Code (28 U. S. C. § 344). The case is still pending on the trial calendar in Westchester County. No final judgment has been entered terminating the litigation on its merits. It is perfectly conceivable that when the facts are presented to the Trial Court the plaintiffs will recover nothing.

That an order of this kind is not final has been recognized by the Court of Appeals in *Atkins* v. *Hertz Drivurself Stations, Inc.*, 261 N. Y. 352, as follows (p. 355):

> "* * * the plaintiff also appealed from the order refusing to strike out the third defense. This latter order is not a final order, * * *."

In *Market Street Railway Co.* v. *Railroad Commission of California, et al.*, 324 U. S. 548, this Court declared (p. 551):

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. § 344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The fact that the ruling may be regarded as settling the law of the case is likewise immaterial.

Georgia Railway & Power Co. v. *Decatur*, 262 U. S. 432, 436-437;
Chesapeake & Ohio Railway Co. v. *McCabe*, 213 U. S. 207, 214.

POINT II.

This Court has heretofore declined to review a final judgment in an action for wrongful death awarding a recovery based upon the Warsaw Convention. *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, certiorari denied 324 U. S. 882.

In the *Wyman* case, which this Court refused to review, petitioners were the executors of a passenger en route from San Francisco to Hong Kong on the aircraft "Hawaii Clipper," who lost his life when the aircraft disappeared in flight between Guam and Manila, P. I. The case was tried in the New York Supreme Court, and following the

conclusion of the trial the Court declared (181 Misc. at pp. 964-965):

> "The rights of the parties are fixed by the rules for 'International Air Transportation' established and concluded at Warsaw, Poland, on October 12, 1929, at a convention of nearly all governments, including the United States. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934 (49 U. S. Stat. 3000), which thus becomes part of the law of the land (U. S. Const., art. VI; *United States* v. *Belmont*, 301 U. S. 324), superseding State law (*Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286; *Conklin* v. *Canadian-Colonial Airways*, 266 N. Y. 244). The said rules were made a condition of the ticket herein (*Murray* v. *Cunard Steamship Co. Ltd.*, 235 N. Y. 162) and in any event are so made under the rules themselves (art. 3, subd. 2).
>
> The Warsaw Convention rules are applicable only to international flights (art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (art. 22) except where the carrier is guilty of 'wilful misconduct' (art. 25.)"

The Court found that there was no evidence of wilful misconduct and accordingly directed final judgment for the plaintiffs in the amount prescribed by the Convention.

The decision was affirmed unanimously without opinion, both by the Appellate Division, First Department, 267 App. Div. 947, and by the Court of Appeals, 293 N. Y. 878. This Court denied certiorari, 324 U. S. 882.

The decision in the present case is likewise in full accord with *Indemnity Insurance Co. of North America* v.

Pan American Airways, Inc., 58 F. Supp. 338, recently decided by District Judge RIFKIND in the District Court for the Southern District of New York. This was an action by the assignee of the parents of Tamara Swann, a passenger on the "Yankee Clipper" who lost her life in the same accident with which the present case is concerned. The second and third defenses pleaded in that case were substantially identical to the first and second defenses in the case at bar. The plaintiff's motion to dismiss the defenses was denied in all respects by Judge RIFKIND, who held (1) that the Warsaw Convention is constitutional, (2) that it is self-executing and limits the defendant's liability as a matter of law, and (3) that since the Convention is valid and operative, the defense based upon the contract of transportation incorporating the terms of the Convention is likewise sufficient in law. The Court rejected the plaintiff's contention that since the cause of action arose under the law of Portugal, the provisions of the Warsaw Convention could not be applied to limit the defendant's liability.

These decisions, as well as the decisions of all three of the lower courts in the case at bar, are fully in accord with established principles governing the application and effect of treaties to which the United States has become a party.

U. S. Constitution, Article VI, Clause 2;
Foster v. *Neilson*, 2 Peters (27 U. S.) 253, 314;
U. S. v. *Rauscher*, 119 U. S. 407, 417-418;
Dainese v. *Hale*, 91 U. S. 13, 18-19;
Asakura v. *Seattle*, 265 U. S. 332, 341;
Valentine v. *U. S. ex rel. Neidecker*, 299 U. S. 5, 10;
Bacardi Corp. v. *Domenech*, 311 U. S. 150, 161.

POINT III.

The limitation of liability provisions in the Warsaw Convention are analogous to the shipowners' limitation of liability statutes and like the latter must be enforced in our courts regardless of where the cause of action arose.

The New York Courts have found as a fact in the present case that the contract of transportation falls squarely within the definition of international transportation contained in Article 1 of the Convention. Petitioners urge that in spite of that finding our courts must apply the law of Portugal, where the accident occurred, to the exclusion of the Convention. The argument is without substance.

As the Appellate Division correctly pointed out, rights of action under Portuguese law are enforced here solely as a matter of comity. The provisions of the Convention, as part of the law of the land, "supersede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori*. * * * Comity is abridged to that extent" (269 App. Div. at p. 292). This ruling is no more than a paraphrase of the words of Mr. Justice Holmes in *The Titanic* (*Oceanic Steam Nav. Co.* v. *Mellor*), 233 U. S. 718. In that case, following the loss of the Titanic, a British vessel, numerous claimants, including British as well as American citizens, brought suit in the Federal and State courts to recover for loss of life and personal injuries, alleging that their rights were governed by British law. The shipowner filed a petition to limit its liability under the Federal statutes. Two of the claimants filed exceptions, asserting that the law of the United States would not apply. In holding that the exceptions should

have been dismissed, this Court said (233 U. S. at pp. 732-733):

> "* * * It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 478, 480. Dicey, Conflict of Laws, 2d ed., 647. It is competent therefore for Congress to enact that in certain matters belonging to admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it may mark out. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527. The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down rights vested under English law, as against, for instance, Englishmen living in England who do not appear. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results in our opinion from the decisions of this court, * * *
>
> * * * A law that limits a right in one case may limit a remedy in another. This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. *Emery* v. *Burbank*, 163 Massachusetts, 326, 328. It clearly limits the remedy, as we have shown, in cases where it has nothing to say about the rights. * * *"

See, to the same effect, *The Mandu*, 102 F. (2d) 459, 463 (C. C. A. 2), and *Royal Mail Steam Packet Co.* v. *Companhia De Navegaco Lloyd Brasileiro*, 31 F. (2d) 757, 759 (E. D. N. Y.), applying the same rule in cases of collisions

occurring within the territorial waters of Brazil and Belgium.

Petitioners, at pages 28 and 29 of their brief, rely on extensive quotations from the opinion of Judge CARDOZO in the case of *Loucks* v. *Standard Oil Company*, 224 N. Y. 99. The essential portion of such quotations is the statement (p. 111) that "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness."

The significance of the *Loucks* case as applied to the present situation lies, however, not in the parts of the opinion which the petitioners have quoted but in a sentence which they have omitted from their brief and which immediately precedes the above quotation. The omitted sentence reads (p. 111):

> "The sovereign in its discretion may refuse its aid to the foreign right."

The fallacy of the petitioners' reasoning is contained in this omission. In the *Loucks* case Judge CARDOZO held that the courts, of their own motion, may not refuse to enforce or may not abridge a foreign right unless it is contrary to public policy. But the learned Judge was also careful to point out that the sovereign, as distinguished from the courts, may (*e. g.*, through the legislature or through adherence to treaties) refuse its aid to the foreign right. The petitioners have entirely overlooked this distinction between the power of the courts and the power of the sovereign.

POINT IV.

Petitioners' arguments that the Convention contravenes the commerce power and is contrary to the Fifth Amendment to the Constitution are without merit.

The petitioners' arguments that the Warsaw Convention conflicts with the commerce clause and with the Fifth Amendment to the Constitution are sufficiently disposed of by the reasoning of Judge RIFKIND in *Indemnity Insurance Co. of North America* v. *Pan American Airways, Inc.*, 58 F. Supp. 338 (S. D. N. Y.). In rejecting the same arguments the Court declared (pp. 339-340):

> "The alleged conflict between the Treaty and the Constitution is asserted to reside in the fact that the Treaty professes to regulate commerce, a power entrusted exclusively to Congress by article 1, section 8, clause 3, without having received the approval of both Houses of Congress. The Warsaw Convention, it is not disputed, was made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring. Article 2, section 2, clause 2. No reported decision has been called to my attention wherein the validity of a treaty duly ratified in the manner prescribed by the Constitution has been challenged on the ground that it conflicts with the power vested in Congress to regulate commerce. While the novelty of an argument is not to be taken against it, nevertheless one cannot fail to observe the uninterrupted uniformity of the practice by which treaties of commerce, from the earliest days of the Republic, have been made in the manner now challenged, without arousing so much as a doubt as to the propriety of the course taken. The broad sweep of the treaty making power is in good measure reflected in the absence of any decision holding a treaty unconstitutional. 63 C. J. 829; *United States*

v. *Thompson*, D. C. E. D. Ark. 1919, 258 F. 257; Butler, Treaty Making Power, Section 454; *In re Terui*, 1921, 187 Cal. 20, 200 P. 954, 17 A. L. R. 630.

Plaintiff cites *Board of Trustees* v. *United States*, 1933, 289 U. S. 48, 56, 53 S. Ct. 509, 77 L. Ed. 1025, *Weber* v. *Freed*, 1915, 239 U. S. 325, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317, *The Abby Dodge*, 1912, 223 U. S. 166, 32 S. Ct. 310, 56 L. Ed. 390. On the point in issue these cases say no more than that the power of Congress to regulate interstate and foreign commerce is exclusive and plenary as against encroachment by state action. They contribute no support to plaintiff's contention. On the other hand, in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 1943, 318 U. S. 36, 42, 63 S. Ct. 488, 87 L. Ed. 596, the court referred to the Ship Owners' Liability Convention of 1936, 54 Stat. 1695, as confirming the right of a seaman to maintenance and cure, without intimating the possibility that that treaty transgressed the commerce clause. And see *Wyman* v. *Pan American Airways, Inc.*, 1943, 181 Misc. 963, 43 N. Y. S. 2d 420, affirmed 267 App. Div. 947, 48 N. Y. S. 2d 459.

* * *

The argument that the treaty is invalid because it deprives plaintiff of its property without due process is rejected. Statutes for the limitation of liability are no novelty. See The Fire Statute, R. S. § 4282, 46 U. S. C. A. § 182; Vessel Limitation of Liability Statute, R. S. § 4283, 46 U. S. C. A. § 183; *Providence & New York Steamship Co.* v. *Hill Mfg. Co.*, 1883, 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. Ed. 1038; Workmen's Compensation Laws; *Mountain Timber Co.* v. *Washington*, 1917, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642."

Petitioners make the further point that the provisions of the Convention may not be invoked in litigation between citizens of the United States. No such limitation is to be found in the pronouncements of this Court. Thus, in *Edye*

v. *Robertson* (*Head Money Cases*), 112 U. S. 580, this Court said, concerning the effect of treaties upon the rights of private litigants (pp. 598-599):

> "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

See, also:

Maiorano v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272-273;
Hamilton v. *Erie R. R. Co.*, 219 N. Y. 343, 351-352.

Concerning the extent of the treaty-making power, this Court said in *Holden* v. *Joy*, 17 Wall. (84 U. S.) 211, 242-243:

> "Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur, and inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."

See, also:

Holmes v. *Jennison*, 14 Pet. (39 U. S.) 540, 569-570;
Geofroy v. *Riggs*, 133 U. S. 258, 266-267.

The case of *Skiriotes* v. *Florida*, 313 U. S. 69, upon which petitioners rely, lends no support to their position. In that case the appellant, a citizen of Florida, had been convicted under a Florida statute forbidding the use of diving equipment in the taking of sponges from the Gulf of Mexico off the coast of Florida. Appellant sought to rely upon certain treaties with Spain and other countries for the prevention of smuggling of intoxicating liquors, his purpose being to show that the place at which the diving operations were conducted was outside the limits of the territorial waters of Florida. The Court pointed out that the appellant was not in a position to invoke the treaties, and that in any event,

> "• • • Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place" (p. 76).

Concerning the scope of the power of the United States over its own citizens, the Court commented as follows (313 U. S. at p. 73):

> "• • • the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas *or even in foreign countries* when the rights of other nations or their nationals are not infringed." (Italics ours.)

What the petitioners' argument comes down to is this—that the powers of the federal government may not be exercised by treaty, as distinguished from statute, to regulate the rights of United States citizens *inter se* within a foreign jurisdiction. The *Skiriotes* case certainly gives no support to any such contention. As the Appellate Division correctly held in the case at bar (269 App. Div. at p. 292):

> "• • • The Convention is not concerned with reciprocal treatment of nationals; its purpose is to

unify rules relating to international transportation by air. There is nothing in the Convention which conditions its application upon nationality but, on the contrary, its provisions affect the rights of all litigants. It must be so enforced. (*Head Money Cases,* 112 U. S. 580, 598, 599; *Hamilton* v. *Erie R. R. Co.,* 219 N. Y. 343, 352; *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, 41, 42.)"

POINT V.

The provisions of the Convention creating a presumption of liability on the part of the carrier and limiting the amount of the liability are self-executing and require no implementing legislation.

The several courts that have had to consider the question have unanimously ruled that the provisions of the Convention at issue herein are self-executing and do not require implementing legislation for their enforcement. The District Court specifically so held in *Indemnity Insurance Co. of North America* v. *Pan American Airways, Inc.,* 58 F. Supp. 338, 340, as did the lower courts in the case at bar. 183 Misc. at p. 259; 269 App. Div. at p. 292. See, also, *Wyman* v. *Pan American Airways, Inc.,* 181 Misc. 963, aff'd 293 N. Y. 878, certiorari denied, 324 U. S. 882.

Petitioners refer to the case of *Choy* v. *Pan-American Airways Co.,* 1941 A. M. C. 483, 1942 U. S. Av. Rep. 93 (S. D. N. Y.), as a case in which the Court "expressly found that the Convention is inoperative." The petitioners have wholly misapprehended the decision in that case. The defendant moved to dismiss a cause of action based on the Warsaw Convention on the ground that the Convention does not create an independent right of action. The motion was properly granted. The defendant did not contend, nor did

the court hold, that the Convention is inoperative as a limitation law. The defendant pleaded the Convention as a separate defense exactly as in the case at bar. The sufficiency of the defense was not at issue on the motion and was not passed upon by the court. It is true, as the court pointed out in the *Choy* case, and as was also held in the *Wyman* case, that the Convention does not create a substantive right of action. It is a limitation law pure and simple and as such requires no implementing legislation.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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